

² Because the other defendant is an unidentified correctional officer ("Officer John Doe"), this Court is unaware as to the progress (or lack of progress) that has taken place in identifying that officer so that process may be served and this action can proceed in those terms. Nor has this Court been apprised as to whether, as might be expected, the Cook County State's Attorney's Office will also be representing.

If Saleh has not in fact exhausted his administrative remedies, that is of course a predicate for dismissal of his action under Section 1997e(a).

That being so, it is simply bad practice for defense counsel to raise the issue in a responsive pleading without bringing it on for consideration by a properly supported threshold motion. That failure is akin to asserting the equivalent of a Fed. R. Civ. P. ("Rule") 12(b)(6) motion as an affirmative defense and letting it sit there, ticking like a delayed time bomb to be exploded at some future date. Accordingly this Court expects Villanova's counsel to raise the failure-to-exhaust issue in an appropriate way promptly. Failure to do so will cause that potential defense to be forfeited.³



Milton I. Shadur
Senior United States District Judge

Date: June 29, 2015

³ It should be added that some of the denials contained in the Answer appear questionable, but that subject will be left to be addressed by Saleh's counsel -- any sua sponte judicial action would appear inappropriate.